

**United States Department of Labor
Employees' Compensation Appeals Board**

A.R., Appellant

and

**U.S. POSTAL SERVICE, PROCESSING &
DISTRIBUTION CENTER, Kansas City, MO,
Employer**

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**Docket No. 14-550
Issued: June 9, 2014**

Appearances:
Appellant, pro se
Office of Solicitor, for the Director

Case Submitted on the Record

DECISION AND ORDER

Before:

ALEC J. KOROMILAS, Alternate Judge
MICHAEL E. GROOM, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On January 13, 2014 appellant timely appealed the September 12, 2013 merit decision of the Office of Workers' Compensation Programs (OWCP) which denied her traumatic injury claim. She also timely appealed an October 11, 2013 nonmerit decision denying reconsideration. Pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board has jurisdiction over the merits of the claim.²

ISSUES

The issues are: (1) whether appellant sustained an injury in the performance of duty on February 15, 2013; and (2) whether OWCP properly denied appellant's September 23, 2013 request for reconsideration.

¹ 5 U.S.C. §§ 8101-8193.

² The record on appeal contains evidence received after OWCP issued its October 11, 2013 decision. The Board is precluded from considering evidence that was not in the case record at the time OWCP rendered its final decision. 20 C.F.R. § 501.2(c)(1) (2012).

FACTUAL HISTORY

On February 15, 2013 appellant, a 52-year-old mail handler, filed a traumatic injury claim (Form CA-1) alleging that she injured her right shoulder in the performance of duty. A forklift maneuvered through the dock area and struck a group of staged all-purpose containers (APC). One of the APCs rolled into appellant. She described her injury as a right shoulder strain. A coworker, Rodney Washington, witnessed the APC hit appellant's right shoulder.³

Dr. Cynthia D. Gill examined appellant on February 18, 2013 and diagnosed right shoulder strain. Appellant reported that a 700-pound APC had fallen into her right shoulder and pushed her aside. There was an immediate onset of stinging in the right shoulder followed by swelling. Appellant had not returned to work since the February 15, 2013 incident. She complained of stinging and burning in the shoulder. X-rays revealed no acute osseous abnormalities. Physical examination of the right shoulder revealed no erythema, ecchymosis, swelling or deformity and there was no muscle atrophy. Palpation of the sternoclavicular and acromioclavicular (AC) joints was normal, but there was mild tenderness on palpation of the glenohumeral joint. Dr. Gill also noted that the musculature of the rotator cuff was nontender. Additionally, there was loss of range of motion with respect to right shoulder abduction and forward flexion. Dr. Gill diagnosed right shoulder strain. She recommended Advil and physical therapy for two weeks. Dr. Gill also placed appellant on modified duty with no work above shoulder height.

On February 18, 2013 OWCP offered appellant a limited-duty assignment as a modified mail handler, which she accepted.

After undergoing physical therapy for two weeks (March 1 to 15, 2013), appellant returned to Dr. Gill for a follow-up examination on March 15, 2013. Dr. Gill noted that, although appellant finished physical therapy, she reportedly was not much better. Appellant's complaints included shoulder popping and clicking, as well as a burning sensation. On physical examination, Dr. Gill noted an audible popping and clicking sound. She diagnosed right shoulder internal derangement. Dr. Gill recommended a magnetic resonance imaging (MRI) scan. She also added a 20-pound maximum lifting limitation to appellant's previous restriction of no work above shoulder height.

A March 22, 2013 right shoulder MRI scan revealed probable tendinopathy/tendinosis of the supraspinatus tendon. There were also findings suspicious of a small tear of the supraspinatus tendon. There was a small cyst along the inferior labrum anteriorly. The reviewing radiologist noted that a small labral tear could not be ruled out. He also classified the shape of appellant's acromion as Type IV.

Appellant returned to Dr. Gill on March 27, 2013. Dr. Gill advised that appellant could resume her full duties effective immediately. She reported constant discomfort

³ Appellant was provided a CA-16 authorization for examination and/or treatment dated February 15, 2013. Such a form creates a contractual obligation to pay for the cost of the examination or treatment regardless of the action taken on the claim. See *Tracey P. Spillane*, 54 ECAB 608 (2003).

of 5-6/10 while at rest; however, physical examination of the right shoulder was unremarkable.⁴ Dr. Gill also reviewed appellant's history of injury, her prior medical treatment, as well as the results of the recent right shoulder MRI scan. She released appellant from her care with a final diagnosis of right shoulder discomfort.

On April 18, 2013 OWCP advised appellant of the need for additional medical evidence in support of her traumatic injury claim. It noted Dr. Gill's varying diagnoses and further commented that she failed to provide an explanation for how the incident work caused or aggravated any of the diagnosed conditions. Appellant was afforded an additional 30 days to submit the requested medical evidence. OWCP did not receive any additional medical evidence within the allotted time frame.

By decision dated May 23, 2013, OWCP denied appellant's traumatic injury claim. It accepted that the February 15, 2013 employment incident occurred as alleged, but found that appellant failed to submit sufficient medical evidence to establish that her right shoulder diagnoses were causally related to the accepted employment incident.

On May 25, 2013 appellant requested a review of the written record. OWCP received additional physical therapy treatment notes dated June 19, 2013.

In a September 12, 2013 decision, the Branch of Hearings and Review affirmed the May 23, 2013 decision. The hearing representative found that the medical evidence of record lacked a reasoned opinion in causal relationship.

On September 23, 2013 appellant requested reconsideration. OWCP denied her request by decision dated October 11, 2013.

LEGAL PRECEDENT -- ISSUE 1

A claimant seeking benefits under FECA has the burden of establishing the essential elements of her claim by the weight of the reliable, probative and substantial evidence, including that an injury was sustained in the performance of duty as alleged and that any specific condition or disability claimed is causally related to the employment injury.⁵

To determine if an employee sustained a traumatic injury in the performance of duty, OWCP begins with an analysis of whether "fact of injury" has been established. Generally, fact of injury consists of two components that must be considered in conjunction with one another. The first component is whether the employee actually experienced the employment incident that

⁴ On visual inspection there was no evidence of erythema, ecchymosis, deformity or swelling. There were no reported abnormalities of the AC joint and no tenderness on palpation of the right shoulder region. Also, appellant had full range of motion, with both abduction and forward flexion to 180 degrees. Additionally, both Neer's sign and Hawkins' sign were negative.

⁵ 20 C.F.R. § 10.115(e), (f); see *Jacquelyn L. Oliver*, 48 ECAB 232, 235-36 (1996).

allegedly occurred.⁶ The second component is whether the employment incident caused a personal injury.⁷

ANALYSIS -- ISSUE 1

Appellant bears the burden of establishing that her right shoulder condition is employment related to the accepted February 15, 2013 incident. The record before the Board consists of physical therapy treatment notes, a March 22, 2013 right shoulder MRI scan and Dr. Gill's three reports covering the period February 18 to March 27, 2013.

Appellant's right shoulder MRI scan revealed probable tendinopathy/tendinosis of the supraspinatus tendon. There were also findings suspicious of a small tear of the supraspinatus tendon, and there was a small cyst along the inferior labrum anteriorly. Additionally, a small labral tear could not be ruled out. The Board-certified radiologist who interpreted the scan did not offer any opinion on causal relationship. When Dr. Gill reviewed the MRI scan findings on March 27, 2013, she also did not offer an opinion regarding the cause of the reported findings. Consequently, the record does not establish that the right shoulder conditions identified on appellant's MRI scan are related to the February 15, 2013 incident.

When Dr. Gill first examined appellant on February 18, 2013, she reported an accurate history of injury and diagnosed right shoulder strain. However, she did not explain how or why the February 15, 2013 incident involving the APC either caused or contributed to the diagnosed condition. When she saw appellant approximately three weeks later, Dr. Gill diagnosed right shoulder internal derangement. But once again, her March 15, 2013 report did not include any opinion on causal relationship. Although Dr. Gill reiterated the February 15, 2013 history of injury, she did not specifically address whether the APC incident was responsible for the then-current diagnosis of internal derangement. Her latest report dated March 27, 2013, similarly failed to address the cause of appellant's ongoing right shoulder discomfort.

The Board notes that appellant submitted physical therapy treatment records from March and June 2013. Certain healthcare providers such as physician assistants, nurse practitioners, physical therapists and social workers are not physicians as defined under FECA.⁸

⁶ *Elaine Pendleton*, 40 ECAB 1143 (1989).

⁷ *John J. Carlone*, 41 ECAB 354 (1989). Causal relationship is a medical question which generally requires rationalized medical opinion evidence to resolve the issue. *See Robert G. Morris*, 48 ECAB 238 (1996). A physician's opinion on whether there is a causal relationship between the diagnosed condition and the implicated employment factor(s) must be based on a complete factual and medical background. *Victor J. Woodhams*, 41 ECAB 345, 352 (1989). Additionally, the physician's opinion must be expressed in terms of a reasonable degree of medical certainty and must be supported by medical rationale, explaining the nature of the relationship between the diagnosed condition and appellant's specific employment factor(s). *Id.*

⁸ 5 U.S.C. § 8101(2); 20 C.F.R. § 10.5(t).

Consequently, their medical findings and/or opinions will not suffice for purposes of establishing entitlement to FECA benefits.⁹

The Board finds that the record is devoid of probative medical evidence addressing the causal relationship between the February 15, 2013 employment incident and appellant's claimed right shoulder condition. Accordingly, OWCP properly denied her traumatic injury claim.

LEGAL PRECEDENT -- ISSUE 2

OWCP has the discretion to reopen a case for review on the merits.¹⁰ An application for reconsideration, including all supporting documents, must set forth arguments and contain evidence that either: (i) shows that OWCP erroneously applied or interpreted a specific point of law; (ii) advances a relevant legal argument not previously considered by OWCP; or (iii) constitutes relevant and pertinent new evidence not previously considered by OWCP.¹¹ When an application for reconsideration does not meet at least one of the above-noted requirements, OWCP will deny the request for reconsideration without reopening the case for a review on the merits.¹²

ANALYSIS -- ISSUE 2

Appellant's September 23, 2013 request for reconsideration neither alleged nor demonstrated that OWCP erroneously applied or interpreted a specific point of law. She also did not advance a relevant legal argument not previously considered by OWCP. Appellant submitted the appeal request form that accompanied OWCP's May 23, 2013 initial denial. Other than placing a check mark next to the reconsideration option, she did not provide any grounds for reconsideration. Therefore, appellant is not entitled to a review of the merits based on the first and second requirements under section 10.606(b)(2).¹³

Appellant also failed to submit any "relevant and pertinent new evidence" with her September 23, 2013 request for reconsideration. The appeal request form was unaccompanied by any additional evidence. Because appellant did not provide any new evidence that might arguably impact the prior decision, she is not entitled to a review of the merits based on the third requirement under section 10.606(b)(2).¹⁴ Accordingly, OWCP properly declined to reopen her case under 5 U.S.C. § 8128(a).

⁹ *K.W.*, 59 ECAB 271, 279 (2007); *David P. Sawchuk*, 57 ECAB 316, 320 n.11 (2006). A report from a physician assistant or certified nurse practitioner will be considered medical evidence if countersigned by a qualified physician. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Causal Relationship*, Chapter 2.805.3a(1) (January 2013).

¹⁰ 5 U.S.C. § 8128(a).

¹¹ 20 C.F.R. § 10.606(b)(2).

¹² *Id.* at § 10.608(b).

¹³ *Id.* at § 10.606(b)(2)(i) and (ii).

¹⁴ *Id.* at § 10.606(b)(2)(iii).

CONCLUSION

Appellant has not established that she sustained an injury in the performance of duty on February 15, 2013. The Board also finds that OWCP properly denied further merit review with respect to her September 23, 2013 request for reconsideration.

ORDER

IT IS HEREBY ORDERED THAT the October 11 and September 12, 2013 decisions of the Office of Workers' Compensation Programs are affirmed.¹⁵

Issued: June 9, 2014
Washington, DC

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

Michael E. Groom, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board

¹⁵ Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision. *See* 5 U.S.C. § 8128(a); 20 C.F.R. §§ 10.605 - 10.607.